

February 17, 1997

Advisory Opinion 1997 - No. 2
Use of Public Resources for Electronic Communications

The Board, on its own motion, issues this advisory opinion clarifying the allowable use of public resources for the distribution of materials by electronic means. The Board originally addressed these issues in the Order of Dismissal in Complaint 1996 - No. 10, but upon reconsideration, vacated the portion of the Order in that case that addressed these issues. This advisory opinion is intended to replace the vacated portion of that Order.

QUESTION

To what extent is the publication or distribution of legislative materials by electronic means restricted or prohibited by the prohibition against the use of public resources for campaign purposes, found at RCW 42.52.180.

OPINION

In our Order of Dismissal in Complaint 1996 - No. 10, we concluded that the mailing restrictions found at RCW 42.17.132 apply only to communications by regular mail and do not apply to communications by electronic means. In that Order, however, we stated our opinion that those same mailing restrictions provide a model, to be applied by analogy, in determining whether other forms of communication constitute the use of public resources for campaign purposes. We stated our intent to apply the legislative purpose of the mailing restrictions found at RCW 42.17.132 to communications by electronic means. We quoted, as follows, the purpose of the mailing restrictions as we interpreted it in Advisory Opinion 1995 - No. 19:

The purpose of RCW 42.17.132 is to reduce the advantage in elections that incumbent legislators previously enjoyed through mailings at public expense during the last year of their terms. This purpose is generally accomplished by limiting the number and kind of mailings that legislators may mail during that year.

It is the purpose of this advisory opinion to clarify the extent to which we apply that purpose to electronic communications and the effect of such application.

Electronic communications can be made either passively, by placing materials on the Internet, for instance, and allowing persons to access and download files, or affirmatively, by sending messages to a recipient by e-mail or facsimile. These two methods of electronic distribution are distinguishable in that the former is not an affirmative act of distribution by which the sender

intends that the recipient will receive the message directly. Rather, it is the passive placement of materials in a location where persons can go, albeit electronically, to access them.

Although the latter method of delivering messages electronically, such as e-mail and fax messages, is not covered by a strict application of the mailing restrictions because it is not regular mail, it is certainly analogous to mail. And it is that analogy that allows us to apply the model provided by the mailing restrictions to those types of messages in determining whether they constitute a violation of the prohibition on the use of public resources for campaign purposes found at RCW 42.52.180. Therefore, we will apply the same standards found in the mailing restrictions at RCW 42.17.132 to e-mails and faxes. In other words, legislators and legislative employees should treat e-mails and faxes as if they were regular mail for purposes of the restrictions found at RCW 42.17.132.

Because the passive placement of materials for electronic access, such as pages on the Internet, is not an affirmative act of sending a message directly to a recipient, it is not analogous to regular mail. The mailing restrictions do not provide an appropriate model in determining whether such passive distribution constitutes a violation of the prohibition on the use of public resources for campaign purposes. Of course, if such materials directly support a campaign, are campaign-oriented or are designed to assist a campaign purpose in any other way, then they will directly violate the prohibition. But the mere act of making them available on the Internet is not, in and of itself, subject to the mailing restrictions, either directly or by analogy.

In Advisory Opinion 1996 - No. 11, we set forth a number of factors that we will use in determining whether the publication and distribution of materials will be considered a violation of the prohibition against the use of public resources for campaign purposes. One of the factors we identified is the proximity of the distribution or publication of the materials to an election. In that opinion, we acknowledged that both the House and the Senate operate under a set of internal rules by which press releases and other distributed documents are reviewed and scrutinized beginning July 1 of an election year. Although we did not adopt that date as one that we would use in applying the law, we recognize that it is reasonable and appropriate for the Legislature to establish a date and we find nothing unreasonable or inappropriate in the date they have chosen.

For purposes of placing materials on the Internet, and other passive communications by electronic means, we will consider the original date that such materials were made available for access to be the date of publication or distribution for purposes of the prohibition against the use of public resources for campaign purposes. Materials that are placed on the Internet well before the start of the campaign season do not, by reason of the campaign season, become prohibited simply because they remain on the Internet through the campaign season. We would not object if the House and Senate, in applying their internal rules, concluded that materials placed on the Internet before the July 1 deadline are appropriate, even if they remain available on the Internet after the deadline. Nor would we object if the House and Senate concluded that materials that are initially made available after the deadline are subject to heightened scrutiny under those internal rules and are potentially inappropriate. Again, materials that directly support a

campaign, are campaign-oriented or are designed to assist a campaign purpose in any other way, will be deemed to violate the prohibition against the use of public resources for campaign purposes, regardless of the timing of their publication or distribution.